Supreme Court, U.S.
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No. 79-1263

In the Supreme Court of the United States

OCTOBER TERM 1979

WILLIAM E. JAHODA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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The respondent makes two points in its Answer praying the Court deny Certiorari:

1. It contends the indictment "charged that Petitioner's tax return was fraudulent because it falsified the amount of his income"—and—"It is only necessary to prove so much of an indictment as establishes, prima facie, that there is a violation of the statute involved" (Answer, p. 3).

It does not contend that any part of the indictment may be altered, thus it does not suggest substituting "various

sources'' for ''gambling business,'' though it concedes the former is what was proved and the latter what was charged. (idem.) Rather, it contends those parts of the indictment not proved be disregarded as surplusage.[1]

The test of this original, and convoluted, argument is its logical extension. More basically, the respondent shies from any demonstration of the accomplishment of its theory. It never brings itself to educate the Court, or the petitioner, at which of the several points of the indictment it can truncate without doing violence to the Fifth and Sixth Amendments.

We *think* the respondent's argument addresses itself to the last paragraph, and that the portion after the semicolon therein may be disregarded. Illustratively:

> ''WHEREAS, as he then and there well knew and believed, he had substantial income in addition to that heretofore stated; ~~and he then and there well knew and believed that he operated a gambling business and failed to disclose on said return the gross wages received, expenses incurred or other information relative to this business.~~'' (Striking above to conform to Respondent's argument).

We *believe* the Respondent is stating that these are particulars of the offense which need not be charged by the grand jury. Logically then, if these are the particulars on which the grand jury predicated its charge (but not necessary to the formal charge), and the defendant has been gratuitously supplied them, by the indictment, then he need not resort to Rule 7(f) of the Federal Rules of

[1] This novel theory rather frustrates the clear intent of Rule 7(e) of the Federal Rules of Criminal Procedure directing that surplusage may be stricken "on the motion of defendant," the theory ascribes a *sub silentio* rule to this Court that portions of an indictment may be declared "surplusage" and thus ignored (but not physically stricken) at the pleasure of the government.

Criminal Procedure. This logical extension leads to the incongruity that if particulars are furnished by order, the government is thus circumscribed in its proof; but if particulars are furnished by indictment, they may be disregarded, and the Bill of Particulars reaches an ascendency above the Bill of Rights.

2. The respondent contends that petitioner was not surprised at the proof at trial and ''he was . . . aware of the particulars of proof which the government intended to present at trial.'' (Respondent's Answer, p. 4).[2]

Assuming that contention can be validly predicated on the stipulations at trial,[3] that does not end the question. Knowing what proof the government intended to present, the petitioner could validly and successfully defend against the charges made. His infinite surprise was that his valid defense to the charge brought did not avert conviction.

[2] This contention is vacuous. The Court of Appeals for the Seventh Circuit raised the facade of such an issue by decision. The petitioner did not claim variance. He claimed failure of proof of the charges made.

[3] The respondent argues that petitioner agreed that he understated his income. This is factual error, and certainly cannot be based on the stipulations at trial. The stipulations made were "to eliminate the necessity of calling witnesses whose testimony would in large part be based upon business records, thereby eliminating foundation testimony, but specifically excepted "an objection based on the grounds of relevancy, and the defendant [petitioner] expressly reserved the right to interpose an objection to the admission into evidence of any of those stipulations and exhibits on the grounds of relevancy." This matter was amplified and agreed on prior to trial. (Tr. 3, 4) Objections were consistently made on the grounds of irrelevancy and immateriality.

CONCLUSION

The essence of the opinion of the Seventh Circuit we here pray this Court to review is a denigration of the Constitutional mandate that "no person shall be held to answer for a . . . infamous crime unless on . . . indictment . . ." and that, if indicted, he must "be informed of the nature and cause of the accusation; . . .", and of the many admonitions of this Court that the mandate must be revered.

We urge this high Court not be diverted from the basic essence of our prayer, by the facile manipulating of fact and issues by the respondent, and its fundamental contention that an accused need only be informed of the "nature" of the accusation, and that the prosecutor may elect the "cause."

It is recognized the Seventh Circuit has directed its opinion not be published, and the respondent's treatment of the issues has been cavalier, but the erosion of Constitutional guarantees are none the less—probably more—affected when they are screened.

We pray the Court grant its Writ of Certiorari, and bring the clear light of fundamental examination to the fundamental questions involved.

Respectfully submitted,

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Attorney for Petitioner